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No. 00-1277

In the Supreme Court of the United States

ILLINOIS STATE UNIVERSITY, ET AL., PETITIONERS

v.

IRIS I. VARNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Congress acted within its power under Section 5 of the Fourteenth Amendment in abrogating the States' sovereign immunity from suit under the Equal Pay Act of 1963, 29 U.S.C. 206(d).

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OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. 23a-52a) is reported at 150 F.3d 706. The order of this Court vacating the judgment and remanding (Pet. App. 21a) is reported at 528 U.S. 1110. The opinion of the court of appeals on remand (Pet. App. 1a-20a) is reported at 226 F.3d 927. The orders of the district court (Pet. App. 77a-87a, 53a-67a) are reported at 986 F. Supp. 1107 and 972 F. Supp. 458, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2000. A petition for rehearing was denied on November 8, 2000 (Pet. App. 88a). The petition for a writ of certiorari was filed on February 6, 2001. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondents represent a class of female professors employed by petitioners Illinois State University and its Board of Regents. Pet. App. 54a. Respondents alleged, among other things, that petitioners paid them less than their male counterparts, in violation of the Equal Pay Act of 1963, 29 U.S.C. 206(d). Pet. App. 54a.[1] Petitioners moved to dismiss the Equal Pay Act claim on the ground of Eleventh Amendment immunity. *Id.* at 56a, 83a-84a. The United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the Act's abrogation of immunity.

The district court denied the motion. The court held that Congress, acting pursuant to its power under Section 5 of the Fourteenth Amendment, validly could, and clearly did, abrogate the States' immunity from suit under the Equal Pay Act. Pet. App. 57a-59a, 85a-87a.

2. Petitioners took an interlocutory appeal from the district court's immunity ruling. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The court of appeals affirmed. Pet. App. 23a-52a.

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[1] Respondents also alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* On appeal, petitioners asserted for the first time in a footnote that Congress did not validly abrogate the States' sovereign immunity for disparate-impact claims under Title VII. The court of appeals declined to address the argument because petitioners had not adequately preserved it. Pet. App. 48a n.14. The issue was not raised in petitioners' first petition for a writ of certiorari. *Id.* at 121a. On remand, the court of appeals again found that the issue was not properly preserved. *Id.* at 20a. Petitioners have not sought review of that aspect of the court of appeals' decision.

The court of appeals first held that Congress intended to abrogate the States' sovereign immunity from Equal Pay Act suits by their employees. Pet. App. 32a. The court also held that Congress, in the exercise of its authority under Section 5 of the Fourteenth Amendment, could properly abrogate the States' sovereign immunity from such suits. *Id.* at 34a-48a. The court found that Congress "had substantial justification to conclude that pervasive discrimination existed whereby women were paid less than men for equal work." *Id.* at 46a. The court further found that the burden-shifting scheme of the Equal Pay Act—which requires plaintiffs to show that the employer pays male and female employees unequal wages for equal work, and defendants to show that the difference is based on any factor other than sex—is "reasonably tailored to remedy intentional gender-based wage discrimination." *Id.* at 47a.

On petition for a writ of certiorari, this Court vacated the court of appeals' judgment and remanded for further consideration in light of *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), which held that the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, was not "appropriate legislation" under Section 5 of the Fourteenth Amendment and thus could not validly abrogate the States' sovereign immunity. Pet. App. 21a.

3. On remand, the court of appeals again affirmed. Pet. App. 1a-20a. The court found that this Court's analysis in *Kimel* "bolstered" its previous decision that Congress validly abrogated the States' immunity from suit under the Equal Pay Act. *Id.* at 18a.

First, the court of appeals explained that the Equal Pay Act, unlike the ADEA, "prohibits little constitutional conduct." Pet. App. 15a. The court reasoned that

intentional sex discrimination, unlike intentional age discrimination, is almost always unconstitutional. *Ibid.* The court thus understood the Equal Pay Act as having been designed, on the whole, to hold employers liable for intentional discrimination, because the Act permits employers to avoid liability if they "provide a neutral explanation for a disparity in pay." *Id.* at 13a.

Second, the court of appeals determined that the existence of sex discrimination by the States was well established. Pet. App. 17a. The court noted that, "by the time the Equal Pay Act was extended to the States, Congress had developed a clear understanding of the problem of gender discrimination on the part of States through its passage of legislation such as the Education Amendments of 1972 * * * and its extension of Title VII to state and local employers in the Equal Employment Opportunity Act of 1972." *Ibid.* The court also noted "the well-documented history of gender discrimination in this Nation, a history that is embodied in the Supreme Court's own jurisprudence." *Ibid.* (citing *United States* v. *Virginia*, 518 U.S. 515, 531 (1996), and *J.E.B.* v. *Alabama*, 511 U.S. 127, 136 (1994)).

ARGUMENT

The court of appeals' ruling that Congress validly abrogated the States' sovereign immunity from suit under the Equal Pay Act is correct and consistent with the decisions of this Court and every other court of appeals that has addressed the question. Further review is therefore unwarranted.

In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the Court held that the inquiry into whether Congress has abrogated the States' sovereign immunity contains two elements: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' * * *

and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Id.* at 55 (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)); accord *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000).

Petitioners "no longer dispute" (Pet. App. 4a n.1) that Congress unequivocally expressed its intent to abrogate the States' immunity from suit under the Equal Pay Act. In *Kimel*, the Court held that the private enforcement provision set forth in 29 U.S.C. 216(b), which authorizes private suits to enforce the Equal Pay Act as well as the ADEA, "clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees." 528 U.S. at 74.

This case thus concerns only the second part of the *Seminole Tribe* inquiry. Petitioners contend (Pet. 11-21) that Congress lacked the authority to abrogate the States' sovereign immunity because the Equal Pay Act is not an "appropriate" exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *University of Ala.* v. *Garrett*, 121 S. Ct. 955, 962 (2001) (Section 5 grants Congress the power to abrogate sovereign immunity); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). That claim does not merit this Court's review for at least three reasons: the lower courts have uniformly rejected such claims, the decision below was correct, and, at a minimum, additional lower courts should be afforded an opportunity to consider such claims in light of this Court's recent Section 5 jurisprudence.

First, every court of appeals that has addressed the question, both before and after *Kimel*, has ruled that the extension of the Equal Pay Act to the States and its attendant abrogation of sovereign immunity is a valid exercise of Congress's Section 5 power. See *Kovace-*

vich v. *Kent State Univ.*, 224 F.3d 806, 819-821 (6th Cir. 2000); *Hundertmark* v. *Florida Dep't of Transp.*, 205 F.3d 1272, 1274 (11th Cir. 2000); *O'Sullivan* v. *Minnesota*, 191 F.3d 965, 968 (8th Cir. 1999); *Anderson* v. *State Univ.*, 169 F.3d 117 (2d Cir. 1999), vacated, 528 U.S. 1111 (2000)[2]; *Ussery* v. *Louisiana*, 150 F.3d 431 (5th Cir. 1998), cert. dismissed, 526 U.S. 1013 (1999); *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997); see also *Usery* v. *Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery* v. *Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977).

Second, contrary to petitioners' argument (Pet. 20-25), the Equal Pay Act's abrogation of the States' sovereign immunity is a permissible exercise of Congress's power under Section 5 of the Fourteenth Amendment to enact "appropriate legislation" to "enforce" the substantive guarantees of the Equal Protection Clause. This Court has recognized that Congress, in exercising that power, "is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Garrett*, 121 S. Ct. at 963. "Rather, Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself

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[2] The court of appeals in *Anderson* remanded the case to the district court. After the district court again upheld the validity of the abrogation of sovereign immunity, see *Anderson* v. *State Univ.*, 107 F. Supp. 2d 158 (N.D.N.Y. 2000), the case settled. We are aware of only one pending appeal involving the validity of the Equal Pay Act's abrogation of the States' sovereign immunity. See *Siler-Khodr* v. *University of Texas Health Sci. Ctr.*, No. 00-50092 (5th Cir.) (argued Feb. 7, 2001).

forbidden by the Amendment's text." *Ibid.* (quoting *Kimel*, 528 U.S. at 81).

The Court has explained that Section 5 legislation that "reach[es] beyond the scope" of constitutional guarantees "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 121 S. Ct. at 963 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). In order to determine whether legislation satisfies that standard, the Court has prescribed a three-step analysis: first, a court must "identify with some precision the scope of the constitutional right at issue," *ibid.*; second, the court must "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States" against the class protected by the statute, *id.* at 964; and, finally, the court must assess whether the "rights and remedies created" by the statute are "designed to guarantee meaningful enforcement" of the constitutional rights that Congress determined the States were violating, *id.* at 966-967. The court of appeals properly applied "these now familiar principles," *id.* at 963, in determining that Congress permissibly abrogated the State's immunity from suit under the Equal Pay Act.

1. *The scope of the constitutional right*: It is "axiomatic" that "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *J.E.B.* v. *Alabama*, 511 U.S. 127, 130-131 (1994). "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States* v. *Virginia*, 518 U.S. 515, 531 (1996) (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)). In contrast to state action based on age (as in *Kimel*) or disability (as in *Garrett*), state action based

on gender bears a "burden of justification" that is "demanding" and "rests entirely on the State." *Id.* at 533. The State must demonstrate "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Ibid.* The justification for gender-based state action "must be genuine, not hypothesized or invented *post hoc* in response to litigation," and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Ibid.* The constitutional right to be free from intentional sex discrimination by the government applies to state employment. See *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 273 (1979).

2. *The history of unconstitutional state discrimination against women*: This Court has already found that women have been the subject of a historical pattern of invidious discrimination by States. See, *e.g.*, *Virginia*, 518 U.S. at 531-532, 543-544; *J.E.B.*, 511 U.S. at 135-136; *Mississippi Univ. for Women*, 458 U.S. at 725 n.10. That reality underlies the Constitution's prohibition on sex discrimination by state actors, see, *e.g.*, U.S. Const. Amends. XIV, XIX, and should obviate the need for an extended inquiry into whether Congress could also have found that such a pattern existed. In any event, Congress extended the Equal Pay Act to the States in the face of ample evidence of a pattern of state constitutional violations.

a. A year before Congress extended the Equal Pay Act to the States and abrogated the States sovereign immunity from private suits under the Act, a plurality of the Court declared, without contradiction, that "[t]here can be no doubt that our Nation has had a long

and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion). The plurality explained that, as a result of "paternalistic attitude[s]" toward women, state "statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." *Id.* at 685. For example, "[n]either slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." *Ibid.* The plurality further observed that, even in 1973, "women still face[d] pervasive, although at times more subtle, discrimination in our educational institutions [and] in the job market." *Id.* at 686; see also *J.E.B.*, 511 U.S. at 136 (noting that women, like racial minorities, have "suffered * * * at the hands of discriminatory state actors during the decades of our Nation's history").

This Court has since recognized that this historical pattern of state-sanctioned discrimination against women "warrants the heightened scrutiny we afford all gender-based classifications today." *J.E.B.*, 511 U.S. at 136; see *Virginia*, 518 U.S. at 531 (observing that the judiciary's "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history"). The Court has also recognized that the pattern of discrimination extends to the sphere of employment. See *Virginia*, 518 U.S. at 531-532, 544 (noting, *inter alia*, governmental discrimination on the basis of sex in employment); *Mississippi Univ. for Women*, 458 U.S. at 725 n.10 ("History provides numerous examples of legislative attempts to exclude women

from particular areas [of employment] simply because legislators believed women were less able than men to perform a particular function."); *Frontiero*, 411 U.S. at 689 n.22 (plurality opinion) (women "have historically suffered discrimination in employment").

In view of the Court's own determination that the States engaged in a pattern of intentional sex discrimination, there should be no need to assess whether the record before Congress also demonstrated such a pattern. Cf. *Kimel*, 528 U.S. at 91 (noting that an examination of the legislative record is not necessary in all circumstances). This case stands in sharp contrast to *Kimel* with respect to the need to consult the record before Congress. *Kimel* concerned Congress's efforts to prohibit discrimination on the basis of age, a classification that is not subject to heightened scrutiny. Age-based classifications do not receive heightened scrutiny in part because the Court has not found a "history of purposeful unequal treatment" of the elderly by the government. See *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976). Accordingly, in *Kimel*, the Court looked to the legislative record to determine whether, notwithstanding the absence of case law establishing the existence of a pattern of unconstitutional state discrimination against older workers, Congress itself had established such a pattern. See *Kimel*, 528 U.S. at 88-91. Here, in contrast, there is extensive case law documenting a pattern of unconstitutional state discrimination against women.

b. In any event, petitioners are mistaken in asserting (Pet. 17-18) that Congress did not have evidence by 1974 of state discrimination against women with respect to employment and wages. Extending the Equal Pay Act to the States was the last of four steps taken by Congress in the early 1970s to address sex dis-

crimination by state and local governments. Specifically, Congress (1) enacted the Education Amendments of 1972, which extended a non-discrimination prohibition to all education programs receiving federal funds, including those of state universities, and extended the Equal Pay Act to all employees of educational institutions, see Education Amemdments of 1972, Pub. L. No. 92-318, Title IX, §§ 901-907, 86 Stat. 373-375; (2) extended Title VII's prohibition against discrimination in employment to state and local employers, see Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103; (3) submitted the Equal Rights Amendments to the States for ratification, see H.R. J. Res. No. 208, 92d Cong., 2d Sess. (1972); and (4) extended the protections of the Equal Pay Act to state employees, see Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55. Between 1969 and 1973, Congress held extensive hearings[3] and received

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[3] See, *e.g.*, *Economic Problems of Women: Hearings Before the Joint Econ. Comm.*, 93d Cong., 1st Sess. (1973) (*Economic Problems of Women*); *Oversight Hearings on Discrimination Against Women: Before the Ad Hoc Subcomm. on Discrimination Against Women of the House Comm. on Educ. and Labor*, 92d Cong., 2d Sess. (1972) (*Discrimination Against Women (1972)*); *Oversight Hearings on Unemployment and Discrimination in Employment Before the General Subcomm. on Labor of the House Comm. on Educ. and Labor*, 92d Cong., 2d Sess. (1972) (*Unemployment and Discrimination*); *Equal Rights for Men and Women 1971: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) (*Equal Rights (1971)*); *Higher Education Amendments of 1971: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor*, 92d Cong., 1st Sess., Pt. 2 (1971) (*Higher Education 2*); *Higher Education Amendments of 1971: Hearings Before the Special Subcomm. on Higher Educ. of the House Comm. on Educ. and Labor*, 92d Cong., 2d Sess., Pt. 1 (1971) (*Higher Education 1*);

numerous reports from the Executive Branch[4] on the subject of sex discrimination, including sex discrimination by the States. The testimony and reports illustrate

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Equal Employment Opportunities Enforcement Act of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare, 92d Cong., 1st Sess. (1971) (*Equal Employment (Senate 1971)*); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 92d Cong., 1st Sess. (1971) (*Equal Employment (House 1971)*); *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor*, 91st Cong., 2d Sess. (1970) (*Discrimination Against Women (1970)*); *The "Equal Rights" Amendment: Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) (*Equal Rights (1970)*); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 91st Cong., 1st & 2d Sess. (1969-1970) (*Equal Employment (1969-1970)*); *Equal Employment Opportunities Enforcement Act: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 91st Cong., 1st Sess. (1969) (*Equal Employment (1969)*).

[4] See, *e.g.*, President's Task Force on Women's Rights & Responsibilities, *A Matter of Simple Justice* (Apr. 1970) (*Simple Justice*); U.S. Dep't of Labor, Women's Bureau, *Fact Sheet on the Earnings Gap* (Feb. 1970) (*Discrimination Against Women (1972)* 17-19); see also President's Comm'n on the Status of Women, *American Women* (1965) (*American Women*); President's Comm'n on the Status of Women, *Report of the Committee on Federal Employment* (1963) (*Federal Employment*); President's Comm'n on the Status of Women, *Report of the Committee on Civil and Political Rights* (1963).

that sex discrimination by state employers was common,[5] that state employers discriminated against

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[5] See, *e.g.*, *Economic Problems of Women* 131 (Aileen C. Hernandez, former member, EEOC) (state and local government employers "are notoriously discriminatory against both women and minorities"); *id.* at 556 (Frankie M. Freeman, U.S. Comm'n on Civil Rights) ("State and local government employment has long been recognized as an area in which discriminatory employment practices deny jobs to women and minority workers."); *Equal Rights (1971)* 479 (Mary Dublin Keyserling, National Consumers League) ("It is in these fields of employment [*i.e.*, state and local government and educational institutions] that some of the most discriminatory practices seriously limit women's opportunities."); *id.* at 548 (Citizen's Advisory Council on Status of Women) ("numerous distinctions based on sex still exist in the law" including "[d]iscrimination in employment by State and local governments"); *Higher Education 2* 1131 (study by American Association of University Women) ("women do not have equal status with men in academe," "particularly * * * in the large public institutions"); *American Women* 19-20 (noting "prejudicial attitudes and practices" by, *inter alia*, "governmental organizations" in "hiring, wages, and promotion").

The President's Commission on the Status of Women surveyed States regarding their employment policies toward women. Eleven States gave the appointing officer "the unrestricted right to specify male or female" candidates for original appointments, and 15 States "permit[ted] the appointing officer to limit his consideration to one sex in promotion." *Federal Employment* 68. Even among those States that limited the appointing officer's individual discretion to decline to consider women, many categorically excluded women from broad categories of jobs. For example, Michigan "require[d] that men only shall apply for classes such as State police trooper, steeplejack, bulldozer operator, prison guard, liquor enforcement operator, [and] patrol boat captain"; Colorado considered men only for "jobs on night shifts, working bars, * * * or where heavy lifting is required"; Illinois considered men only for positions such as prison guard and district office police clerk; and Indiana and Texas considered men only for positions requiring physical strength. *Id.* at 71-73. Even when women were not for-

women with respect to wages,[6] and that existing remedies, at both the state and federal level, were inadequate.[7] Much of that evidence revealed

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mally excluded from positions, States reported that their agencies did not consider women for positions for which they were qualified. See *id.* at 72 (Oregon reported that "the employing agencies sometimes ignore the women certified"; Montana reported that "we have certain positions that could be filled by women for which men are usually selected").

[6] See, *e.g.*, *Equal Employment (House 1971)* 486, 489 (Modern Language Association) (in survey of language departments, half at public colleges and universities, "salary differences between men and women full-time faculty members are substantial," even "at equivalent ranks in the same departments"); *id.* at 510 (Dr. Ann Scott, National Organization for Women) (noting that women in state employment "suffer some of the worst discrimination," which could be addressed by extension of the Equal Pay Act); *Discrimination Against Women (1970)* 301 (Dr. Bernice Sandler, Women's Equity Action League) (noting that "[s]alary discrepancies abound" in the academic ranks of public and private universities; "[n]umerous national studies have documented the pay differences between men and women with the same academic position and qualifications"); *id.* at 644-645 (Peter Muirhead, Deputy Assistant Secretary, Department of Health, Education and Welfare) (observing, with respect to public and private universities, that "[a]t all faculty ranks, women are paid less than their male colleagues," and that such "inequities are so pervasive that direct discrimination must be considered as p[l]aying a share"); *id.* at 1034-1036 (Alan Bayer & Helen Astin) (empirical study of recent doctoral recipients reports that "[a]cross all work settings [including public universities], fields, and ranks, women experience a significantly lower average academic income than do men in the academic teaching labor force for the same amount of time").

[7] Before the extension of the Equal Pay Act and Title VII to the States, some state employers were subject to federal nondiscrimination requirements as a condition for receiving federal contracts or certain federal funds. Congress was advised, however, that neither those requirements nor suits under the Equal Protection Clause were sufficient to eradicate discrimination

widespread and entrenched employment discrimination against women employed at state colleges and universities.[8] Congress heard detailed testimony that

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against women in state employment. See, *e.g.*, *Discrimination Against Women (1970)* 26 (Jean Ross, American Association of University Women) ("[A]s in the case of [racial minorities], the additional protective acts of recent years, such as the Equal Pay for Equal Work Act and the Civil Rights Act[,] are required and need strengthening to insure the equal protection under the law which we are promised under the Constitution."); *id.* at 304 (Dr. Bernice Sandler) (noting the need for additional legislation "to begin to correct many of the inequities that women face," including "salary inequities" at colleges and universities); *Equal Employment (1969)* 51-52 (William H. Brown III, Chair, EEOC) (observing that "most" state and local governments "do not have effective equal job opportunity programs, and the limited Federal requirements in the area (e.g., 'Merit Systems' in Federally aided programs) have not produced significant results"). Nor were effective state remedies perceived to be available. See, *e.g.*, *Discrimination Against Women (1970)* 133 (Wilma Scott Heide, Pennsylvania Human Relations Comm'n) (urging that Title VII be extended to educational institutions because "[o]nly a couple States have or currently contemplate any prohibition of sex discrimination in educational institutions"); *Equal Rights (1970)* 744 (while 31 States had laws requiring equal pay for equal work, only nine of those laws applied to public employment); *Equal Employment (1969)* 170 (Howard Glickstein, U.S. Comm'n on Civil Rights) (noting that state and local fair employment commissions had not dealt effectively with discrimination in public employment).

[8] See, *e.g.*, *Simple Justice* 6-7 (urging extension of Title VII to state employers and finding that "[t]here is gross discrimination against women in education"); *Equal Rights (1971)* 269 (Dr. Bernice Sandler) (noting the "massive, pervasive, consistent, and vicious pattern of discrimination against women in our universities and colleges" and citing examples of such discrimination at state institutions); *Discrimination Against Women (1970)* 299-302 (Dr. Bernice Sandler) (noting instances of employment discrimination by state-supported universities); *id.* at 379 (Dr. Pauli Murray) (urging that Title VII be extended to "public and private institu-

women at state institutions throughout the country, including in Illinois, were paid less than men for substantially the same work.[9] For example, officials of the Department of Health, Education, and Welfare reported to Congress on their investigation that found such discrimination at one large state university. The officials further reported that the university that they had studied was "not unlike other universities" in that regard.[10]

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tions of learning" given the "pattern or practice of discrimination in many educational institutions"); *id.* at 452 (Virginia Allan, President's Task Force on Women's Rights and Responsibilities) (noting "the growing body of evidence of discrimination against women faculty in higher education").

[9] See, *e.g.*, *Discrimination Against Women (1970)* 151, 159 (Dr. Ann Scott) (describing study at the State University of New York-Buffalo that found that "women in the same job categories, administrative job categories, with the same degrees as men received considerably less money as a group"); *id.* at 1225 (study by Dr. Jane Loeb, Chairman, Urbana AAUP Committee on Status of Women) ("The[] data strongly suggest that men and women within the same departments [at the University of Illinois at Urbana-Champaign], holding the same rank, tend not to be paid the same salaries: women on the average earn less than men"); *id.* at 1228 (Salary Study at Kansas State Teachers College) ("Women full-time faculty members experience wide discrimination throughout the college in matters of salaries for their respective academic ranks."); *Equal Rights (1971)* 268 (Dr. Bernice Sandler) ("At the University of Arizona, women who were assistant and associate professors earned 15 percent less than their male counterparts. Women instructors and full professors earned 20 percent less."); *ibid.* (in a "comprehensive study at the University of Minnesota, women earned less in college after college, department after department—in some instances the differences exceeding 50 percent").

[10] See, *e.g.*, *Higher Education 1* 298 (letter of Don F. Scott, Office for Civil Rights, Dep't of Health, Education, and Welfare) (noting Department's findings that at the University of Michigan

The congressional committee reports on the various enactments of the period noted the "scope and depth of the discrimination" against women, much of which was found to be "directly attributable to governmental action both in maintaining archaic discriminatory laws and in perpetuating discriminatory practices in employment, education and other areas." H.R. Rep. No. 554, 92d Cong., 1st Sess. 51 (1971) (Higher Education Act of 1971); S. Rep. No. 689, 92d Cong., 2d Sess. 7 (1972) (Equal Rights Amendment). A number of Members of Congress expressed the view that the "well documented" record developed at the hearings revealed "widespread," "persistent," "endemic," "systemic[]," and "rampant" sex discrimination,[11] including sex dis-

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"women are in many cases getting less pay than men with the same job titles, responsibilities, and experience" and that "men [are receiving] higher starting salaries than women in the same job classifications"); *id.* at 275 (Owen Kiely, Chief, Contract Compliance Div., Office of Civil Rights, Dep't of Health, Education, and Welfare) ("We found that there were differences in rates of pay [at the University of Michigan] for the same positions in the academic area so that females generally got less for the same position than males did. We found similar patterns in the nonacademic area."); *id.* at 277-278 (Stanley Pottinger, Director, Office of Civil Rights, Dep't of Health, Education, and Welfare) (noting that, "although we have concentrated our actions here on the [U]niversity [of Michigan], it is not unlike other universities").

[11] See 118 Cong. Rec. 3936, 5804 (1972) (Sen. Bayh) (observing that "[d]iscrimination against females on faculties and in administration is well documented" and referencing both public and private institutions); *id.* at 4817-4818 (Sen. Stevenson) (observing that "[s]ex discrimination, especially in employment, * * * is widespread and persistent," and relying, *inter alia*, on disparities in male and female salaries at institutions of higher education); *Equal Rights (1971)* 95 (Rep. Ryan) ("Discrimination levied against women does exist; in fact, it is endemic in our society."); *Discrimination Against Women (1970)* 3 (Rep. Green) ("too often

crimination by state government employers that "persist[ed]" despite the fact that it was "violative of the Constitution of the United States."[12] And, more specifically, they concluded that many employers, including state government employers, were not paying women equal wages for equal work[13] and that the exist-

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discrimination against women has been either systematically or subconsciously carried out" by "Congress and State legislatures"); *id.* at 235 (Rep. May) ("[S]ex discrimination in the colleges and universities of this Nation * * * is running rampant."); *id.* at 738 (Rep. Griffiths) ("The extent of discrimination against women in the educational institutions of our country constitutes virtually a national calamity."); *id.* at 750 (Rep. Heckler) ("Discrimination by universities and secondary schools against women teachers is widespread.").

[12] 118 Cong. Rec. 1412 (1972) (Sen. Byrd).

[13] Members of Congress relied, *inter alia*, on the Department of Labor *Fact Sheet on the Earnings Gap* (see note 4, *supra*), which found large differences in median wages between men and women full-time workers in general occupational groupings. For example, the *Fact Sheet* reported that, "in institutions of higher education in 1965-66, women full professors had a median salary of only $11,649 as compared with $12,768 for men," and that "[c]omparable differences" were found among associate professors, assistant professors, and instructors. *Discrimination Against Women (1970)* 18. Members of Congress determined that "these differences [in median pay of men and women faculty members] do not occur by accident," but instead "are the direct result of conscious discriminatory policies." *Id.* at 434 (Rep. Mink); see 118 Cong. Rec. at 5805 (Sen. Bayh) (noting that women faculty members "often do not receive equal pay for equal work"); *id.* at 4817-4818 (Sen. Stevenson) (citing salary disparities between male and female faculty members as evidence of discrimination).

Members of Congress also relied on other evidence of wage disparities to conclude that public and private employers were discriminating against women. See, *e.g.*, 117 Cong. Rec. 39,250 (1971) (Rep. Green) (noting the "ample documentation" contained in a "two volume hearing record" of discrimination against women in

ing laws did not adequately address that problem.[14] Thus, as the court of appeals recognized, "Congress had

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institutions of higher learning); 118 Cong. Rec. at 5804-5805 (Sen. Bayh) (noting that "[o]ver 1,200 pages of testimony document the massive, persistent patterns of discrimination against women in the academic world," such as evidence that the University of Pittsburgh "was saving $2,500,000 by paying women less than they would have paid men with the same qualifications"); *id.* at 1840 (Sen. Javits) (noting that state and local governments' "differentiation * * * in respect of income" among male and female employees indicates that "something is not right in terms of the way in which the alleged concept of equal opportunity is being administered"); *id.* at 1992 (Sen. Williams) ("Perhaps the most extensive discrimination in educational institutions, however, is found in the treatment of women. * * * [T]his discrimination does not only exist as regards to the acquiring of jobs, but * * * is similarly prevalent in the area of salaries and promotions where studies have shown a well-established pattern of unlawful wage differentials and discriminatory promotion policies."); *Discrimination Against Women (1970)* 740 (Rep. Griffiths) ("Numerous studies document the pay differences between men and women with the same academic rank and qualifications.").

[14] See, *e.g.*, 118 Cong. Rec. at 4931 (Sen. Cranston) (employees of educational institutions "are, at present, without an effective Federal remedy in the area of employment discrimination"); *id.* at 5804 (Sen. Bayh) (noting the need for "a strong and comprehensive measure" to "provide women with solid legal protection from * * * persistent, pernicious discrimination" in higher education); *id.* at 274 (Sen. McGovern) (describing as "weak" and "ineffective" the measures then available to the federal government to combat "discrimination against women in our academic institutions"); *Equal Rights (1971)* 85, 87 (Rep. Mikva) (arguing that the extension of Title VII to the States and of the Equal Pay Act to professionals were "needed interim to and supplemental to" the ratification of the Equal Rights Amendment and its "implementation under the 14th amendment"); *Discrimination Against Women (1970)* 235 (Rep. May) (unless the civil rights laws are extended to educational institutions, "there is no effective legal way to get at them"); *id.* at 750 (Rep. Heckler) (observing that the Fourteenth

developed a clear understanding of the problem of gender discrimination on the part of States through its passage of legislation such as the Education Amendments * * * and its extension of Title VII to state and local employers." Pet. App. 17a.

Petitioners object (Pet. 17 n.2) that the congressional hearings, reports, and debates do not all directly relate to the proposed amendments to the Equal Pay Act. But such objections reflect an artificial view of the legislative process and have no basis in this Court's Section 5 jurisprudence. Often, Congress conducts hearings to assess a problem and to survey a range of solutions, some of which may not be implemented simultaneously, if at all. Moreover, members of Congress can be expected to recall what they learned from one set of hearings or debates when they consider other proposals on the same subject. As Justice Powell noted, "[a]fter Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove* v. *Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring). Moreover, there is no requirement in this Court's Section 5 jurisprudence that the inquiry into whether Congress found a pattern of unconstitutional discrimination must be based solely on the legislative record for the specific enactment at issue. Indeed, as petitioner concedes (Pet. 15 n.1), "[t]his Court has noted that congressional 'findings' are not a prerequisite to abrogation." To the extent that such findings inform the Section 5 analysis, they help to ensure that Congress was responding to a real problem

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Amendment "has not been effective in preventing sex discrimination against teachers in public schools").

in a manner that is proportional and congruent. Those purposes are served by an extensive record of state constitutional violations, whether or not the record was compiled with respect to the particular statute before the court. Indeed, Congress's exercise of Section 5 power may be most readily justified in the face of a legislative record of unconstitutional state conduct that transcends the particular remedy under consideration. For all of those reasons, when Congress decided in 1974 to extend the Equal Pay Act to the States and abrogate the States' sovereign immunity from private suits, Congress may be presumed to have drawn upon the evidence of sex discrimination in state employment contained in the previous four years of hearings and debates on the subject.

In any event, even if considered in isolation, the hearings on the legislation that ultimately extended the Equal Pay Act to the States revealed extensive evidence of sex discrimination by States as employers.[15] Congress heard testimony that, because public employees were exempted from the Equal Pay Act, wages for women in state and local government jobs "are most often lower than [those of] their male counterparts."[16]

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[15] See *To Amend the Fair Labor Standards Act: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 91st Cong., 2d Sess., Pt. 1 (1970) (*FLSA Hearings (1970)*); *Fair Labor Standards Amendments of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 92d Cong., 1st Sess., Pt. 1 (1971) (*FLSA Hearings (1971)*); *Fair Labor Standards Amendments of 1973: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 93d Cong., 1st Sess., Pt. 2 (1973) (*FLSA Hearings (1973)*).

[16] *FLSA Hearings (1971)* 292-293 (Judith A. Lonnquist, National Organization for Women).

Congress also heard testimony that existing anti-discrimination remedies were insufficient.[17] In addition, Congress heard testimony not only that women received unequal pay for equal work at universities and colleges generally,[18] but also that a number of state universities, in particular, paid women less than men for the same work.[19] Witnesses also testified that

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[17] See *FLSA Hearings (1971)* 288-289 (Lucille Shriver, National Federation of Business and Professional Women's Clubs) (expressing the view that extending Title VII would not be sufficient); *FLSA Hearings (1973)* 46a (National Federation of Business and Professional Women's Clubs) (FLSA coverage of state employers "is sorely needed").

[18] See *FLSA Hearings (1971)* 321 (Dr. Bernice Sandler) ("Salary differences between men and women doing the same work and with the same title are the rule, rather than the exception in universities and colleges."); *id.* at 350 (article by Dr. Alan Bayer & Dr. Helen Astin) ("Across all work settings, fields, and ranks, women experience a significantly lower average academic income than do men in the academic teaching labor force for the same amount of time."); *id.* at 363 (Helen Bain, National Education Association) ("At the college level women faculty members, almost without exception, receive, on the average, substantially less for the same work than do their male counterparts."); *id.* at 748 (Jean Ross) (although "nationally, women comprise about 22 percent of the faculty at all ranks in higher education in the United States," "women are not filling a comparable proportion of the higher paying posts in higher education in either faculty or administrative positions).

[19] See *FLSA Hearings (1971)* 322-324 (Dr. Bernice Sandler) (reporting on evidence from University of Arizona, University of Minnesota, Kansas State Teachers College, University of Pittsburgh, Michigan State University, and University of California at Berkeley that "[w]omen are simply paid less than their male counterparts"); *id.* at 747 (Jean Ross) (University of Minnesota); *FLSA Hearings (1970)* 477-478 (Wilma Scott Heide, National Organization for Women) (University of Minnesota, State University of New York at Buffalo, University of Maryland, and

public elementary and secondary schools[20] did not pay women equally with their male counterparts for equal work.[21] Thus, whether one focuses solely on the

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University of Pittsburgh); *id.* at 558 (Salary Study at Kansas State Teachers College).

[20] Although school districts are generally not an "arm of the state" protected by the Eleventh Amendment, see *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977), there are some significant exceptions to that rule. See *Belanger* v. *Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992) (California school districts are protected by Eleventh Amendment), cert. denied, 507 U.S. 919 (1993); *Rosenfeld* v. *Montgomery County Pub. Schs.*, 41 F. Supp. 2d 581 (D. Md. 1999) (Maryland school districts are protected by Eleventh Amendment). The law in other States remains in flux. See, *e.g.*, *Martinez* v. *Board of Educ. of Taos Municipal Sch. Dist.*, 748 F.2d 1393 (10th Cir. 1984) (New Mexico school districts are protected by Eleventh Amendment), overruled by *Duke* v. *Grady Municipal Schs.*, 127 F.3d 972 (10th Cir. 1997); *Harris* v. *Tooele County Sch. Dist.*, 471 F.2d 218 (10th Cir. 1973) (Utah school districts are protected by Eleventh Amendment), overruled by *Ambus* v. *Granite Bd. of Educ.*, 995 F.2d 992 (10th Cir. 1993) (en banc). Given that some school districts are "beneficiaries of the Eleventh Amendment," the evidence before Congress regarding the treatment of women in public schools is relevant in assessing the legislative record. See *Garrett*, 121 S. Ct. at 965.

[21] See *FLSA Hearings (1971)* 317 (Dr. Ann Scott) ("discrimination of salaries paid to woman teachers pervades the entire public school system"); see also *Equal Rights (1971)* 548 (Citizen's Advisory Council on the Status of Women) ("numerous distinctions based on sex still exist in the law" including "[d]ual pay schedules for men and women public school teachers"); *Equal Employment (Senate 1971)* 433 (Mary Jean Collins-Robson, National Organization for Women) ("For example, in Salina, Kansas, the salary schedule provides $250 extra for male teachers; in Biloxi, Mississippi, men receive an additional $200."); *Unemployment and Discrimination* 221 (Mary King, school board member) ("The cleaning men and cleaning women in the Euclid schools do almost the same

hearings concerning the Equal Pay Act extension or on the record more broadly, the existence of a pattern of unconstitutional discrimination against women by States was well established.

That record is further bolstered by the "extensive litigation and discussion of the constitutional violations" in the federal courts. See *Garrett*, 121 S. Ct. at 968 (Kennedy, J., concurring). This Court has repeatedly invalidated state laws and practices that invidiously discriminated on the basis of sex.[22] In addition, the lower federal courts continue to find that States discriminate against women in employment in violation of both the Equal Protection Clause and the disparate treatment provisions of Title VII.[23] Those cases provide "confirming judicial documentation," *ibid.*, of unconstitutional state sex discrimination.

3. *The congruence and proportionality of the remedy*: The Equal Pay Act is a congruent response to a documented pattern of unconstitutional state dis-

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work, although there are slightly different job descriptions. The women earn $2,500 less per year than the men.").

[22] See, *e.g.*, *Virginia*, *supra* (higher education); *J.E.B.*, *supra* (jury peremptory challenges); *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981) (property disposition); *Stanton* v. *Stanton*, 421 U.S. 7 (1975) (child support); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) (jury service); *Reed* v. *Reed*, 404 U.S. 71 (1971) (estate administration).

[23] See, *e.g.*, *White* v. *New Hampshire Dep't of Corr.*, 221 F.3d 254 (1st Cir. 2000); *Thomas* v. *Texas Dep't of Criminal Justice*, 220 F.3d 389 (5th Cir. 2000); *Lathem* v. *Department of Children and Youth Servs.*, 172 F.3d 786 (11th Cir. 1999); *Nicks* v. *Missouri*, 67 F.3d 699 (8th Cir. 1995); *Cross* v. *Alabama*, 49 F.3d 1490 (11th Cir. 1995); *Catlett* v. *Missouri Highway & Transp. Comm'n*, 828 F.2d 1260 (8th Cir. 1987), cert. denied, 485 U.S. 1021 (1988); *Craik* v. *Minnesota State Univ. Bd.*, 731 F.2d 465 (8th Cir. 1984); *Sweeney* v. *Board of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980).

crimination in the wages paid female workers and is an effort to enforce the Constitution's prohibition against such discrimination. The Act prohibits employers from paying workers of one sex more than workers of the opposite sex for performing "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. 206(d)(1); see *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). The Constitution itself forbids such disparities if they result from intentional discrimination on the basis of sex. The Equal Pay Act enforces that constitutional prohibition by shifting the evidentiary burden when a wage disparity is shown. Once an employee has proven equal work and unequal pay, an employer bears the burden of persuasion (if it chooses to mount an affirmative defense) to show that the difference was based on "any other factor other than sex." 29 U.S.C. 206(d)(1); *Corning Glass Works*, 417 U.S. at 196-197. In essence, Congress has established a rebuttable presumption that unequal pay of male and female workers for equal work is intentional sex discrimination, but permits employers to rebut that presumption by showing that the actual cause of the disparity is "any" factor other than sex. The burden-shifting provisions of the Equal Pay Act are designed "to confine the application of the Act to wage differentials attributable to sex discrimination." *County of Washington* v. *Gunther*, 452 U.S. 161, 170 (1981).[24]

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[24] Petitioners assert (Pet. 12) that what this Court has described as "the catch-all exception for differentials 'based on any other factor other than sex,'" *Corning Glass Works*, 417 U.S. at 204, requires an employer to show the factor causing the wage disparity between employees performing equal work is a "'business' necessity." The courts of appeals are divided on whether the defense is

Petitioners do not directly challenge the Equal Pay Act's burden-shifting mechanism as failing the requirements of proportionality and congruence. Instead, relying on this Court's decision in *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999), petitioners contend

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limited to instances of business necessity. See *Randolph Cent. Sch. Dist.* v. *Aldrich*, 506 U.S. 965 (1992) (White, J., dissenting from denial of certiorari) (collecting cases). Petitioners fail to note that their proffered interpretation of the "any factor" defense is contrary to that previously adopted by the Seventh Circuit, which has taken the position that the defense does not impose a requirement that the factor be "business-related." *Ibid.* (citing *Fallon* v. *Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989)); see also Pet. App. 13a (noting that the Equal Pay Act provides "a broad exemption from liability" for "any employer who can provide a neutral explanation for a disparity in pay"); *Fyfe* v. *City of Fort Wayne*, 241 F.3d 597, 600 (7th Cir. 2001) ("the Equal Pay Act's fourth affirmative defense is a broad, catch-all exception that embraces a nearly limitless array of ways to distinguish among employees"). Petitioners are thus challenging the Equal Pay Act's abrogation of sovereign immunity based on an interpretation of the Act that, under circuit precedent, would not even apply to them. In any event, to the extent that the proper scope of this statutory affirmative defense implicates the constitutional issues raised in the petition, it provides another reason for deferring review. Cf. *Garrett*, 121 S. Ct. at 960 n.1 (declining to reach the question whether the States are amenable to suit under Title II of the Americans with Disabilities Act of 1990 in the face of a circuit conflict over the construction of Title II). The circuit conflict on that issue predates recent developments in this Court's Section 5 jurisprudence. Whether a provision genuinely susceptible of two constructions, either of which would constitutionally apply to all employers, public and private alike, under the Commerce Clause, should be interpreted in a manner to avoid serious constitutional question in its application to private suits against unconsenting States for damages is a question that has not been explored in the lower courts.

(Pet. 15, 18-20) that any Section 5 legislation that prohibits more conduct than does the Constitution itself must be predicated on evidence that the States did not provide their own adequate remedies. Petitioners are mistaken. In *Florida Prepaid*, the Court considered whether the Patent Remedy Act, which authorized suits for damages against States for patent violations, was an appropriate exercise of Congress's Section 5 authority. As the Court noted, the Due Process Clause does not prohibit all state interferences with property rights, but only interferences that deprive persons of property "without due process." 527 U.S. at 642-643. Patent infringement by a State thus does not violate the Due Process Clause unless, at a minimum, "the State provides no remedy, or only inadequate remedies, to injured patent owners." *Id.* at 643. Accordingly, the Court examined the adequacy of state remedies because a procedural due process violation is not complete until a State deprives a person of property and denies an adequate remedy. A violation of the Equal Protection Clause, by contrast, is complete at the time that the State invidiously discriminates, regardless of whether redress may be available under state law. As this Court has recognized, because "every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments," "Congress has the power to provide for the correction of the constitutional violations of every such official *without regard to the presence of other authority in the State that might possibly revise their actions.*" *United States* v. *Raines*, 362 U.S. 17, 25 (1960) (emphasis added).

In any event, petitioners are also mistaken as to the availability of state remedies in 1974. Before extending the Equal Pay Act to the States, Congress heard testimony that only nine States had applied their equal pay

laws to themselves, and that state non-discrimination policies were often ignored in practice. See note 7, *supra*. Congress also heard testimony that existing federal remedies (including suits to enforce the Equal Protection Clause's prohibition on intentional discrimination) were not sufficient to eliminate discrimination against women, which was deeply entrenched and sometimes difficult to detect. See notes 7, 14, *supra*. And, even after Congress extended Title VII to the States, the Chair of the EEOC told Congress that state and local governments were "the biggest offenders" of Title VII's prohibition on sex discrimination and that "[w]e have a great deal of problems both with educational institutions and State and local governments."[25]

Petitioners do not otherwise appear to dispute the appropriateness of the burden-shifting mechanism that Congress employed in the Equal Pay Act. Indeed, this Court has recognized that, in order to prevent race or sex discrimination in violation of the Equal Protection Clause, "Congress can prohibit laws with discriminatory effects." *Flores*, 521 U.S. at 529; see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325-337 (1966) (upholding constitutionality of Section 5 of Voting Rights Act of 1965, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect, even if no discriminatory intent is shown); see also *Garrett*, 121 S. Ct. at 967 (discussing *South Carolina* v. *Katzenbach* with

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[25] *Economic Problems of Women* 105-106; see also 2 United States EEOC, *Minorities and Women in State and Local Government 1974*, State Governments iii Research Report No. 52-2 (1977) ("minorities and women continue to be concentrated in relatively low-paying jobs, and even when employed in similar positions, they generally earn lower salaries than whites and men, respectively").

approval); *Lopez* v. *Monterey County*, 525 U.S. 266, 283 (1999).

Here, by contrast, Congress did not impose an effects test, see *Gunther*, 452 U.S. at 170-171, but simply shifted the burden to the State to prove a non-discriminatory reason for a wage disparity between men and women doing the same job. Such a burden-shifting mechanism is particularly appropriate in the context of efforts to root out unconstitutional intentional discrimination on the basis of race or sex because the most relevant evidence will often be in the control of the party allegedly engaging in the discrimination. Given the "wide latitude" to which Congress is entitled in exercising its comprehensive remedial power under Section 5 of the Fourteenth Amendment, *Florida Prepaid*, 527 U.S. at 639 (quoting *Flores*, 521 U.S. at 519-520), the Equal Pay Act's scheme to detect and deter sex discrimination in wages is an appropriate exercise of Congress's Section 5 authority.

Finally, even if petitioner's challenge to the abrogation of state sovereign immunity from private suits under the Equal Pay Act were more substantial, prudential considerations would counsel against review of the question in this case. This Court's recent Section 5 jurisprudence has concerned anti-discrimination statutes that address classifications that are not subject to heightened scrutiny under the Fourteenth Amendment. See *Garrett*, *supra* (disability); *Kimel*, *supra* (age). While the court of appeals in this case has already examined the application of *Kimel* (and, by extension, *Garrett*, which applied the same "now familiar principles," 121 S. Ct. at 963) to the Equal Pay Act, most courts of appeals have not yet considered the application of this Court's most recent Section 5 jurisprudence to anti-discrimination statutes such as

the Equal Pay Act, which address classifications that are subject to heightened scrutiny. Any consideration by this Court of the Equal Pay Act's abrogation of sovereign immunity would benefit from consideration of the question by additional courts of appeals. Such consideration will also provide the courts of appeals an opportunity to resolve questions of statutory interpretation that may inform the constitutional inquiry. See, *e.g.*, note 24, *supra*. Of course, to the extent that the lower courts continue uniformly to uphold the Equal Pay Act's abrogation of sovereign immunity, this Court's review may never become necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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